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Required, Permissible, and Impermissible Forms of Federal Judicial Assistance to Self-Represented Litigants: Toward Establishment of a Judicial Duty of Reasonable Assistance

Jona Goldschmidt
Loyola University Chicago, jgoldsc@luc.edu

REQUIRED, PERMISSIBLE, AND IMPERMISSIBLE FORMS OF FEDERAL JUDICIAL ASSISTANCE TO SELF-REPRESENTED LITIGANTS: TOWARD ESTABLISHMENT OF A JUDICIAL DUTY OF REASONABLE ASSISTANCE

Jona Goldschmidt[†]

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† Department of Criminal Justice and Criminology; Professor at Loyola University Chicago; jgoldsc@luc.edu

Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word.[1]

INTRODUCTION

One of the most pressing questions facing the judiciary today is: Whether and to what extent judges must or may afford self-represented litigants (SRLs)[2] information, assistance, or accommodations in the litigation process, consistent with their right to due process of law, and the judicial duty to ensure a fair and impartial trial? Undoubtedly, the state court opinion passage quoted above describes an undesirable and avoidable situation. The Supreme Court, however, has given mixed messages to lower courts regarding this question. It has indicated, on the one hand, that SRLs must follow the same rules and procedures as represented parties, that SRLs are not entitled to instruction from the trial judge regarding courtroom procedures and on matters that would ordinarily be attended to by counsel, and that judges may not act as attorneys or paralegals for SRLs. On the other hand, some of the Court's opinions reflect a sensitivity to the inequality between SRLs and lawyers and recognize the disadvantages they face in litigation. The Court has, however, occasionally recognized a need for judges to provide notice of certain procedural traps that unwary SRLs may face. A failure to provide such notice of procedural traps may deny SRLs their day in court, but the Supreme Court has never set forth a general duty on the part of trial judges to assist SRLs.

In an effort to assist the judiciary in navigating the seemingly mixed messages coming from the Supreme Court, this paper reviews federal Circuit Court of Appeals case law which discusses required, permissible, and impermissible forms of judicial assistance to SRLs. Part I presents Supreme Court rulings on the right to self-representation, noting that the right has been expressly applied in the criminal context, but only impliedly for civil litigants. Part II describes the Court's early rulings in which judges were advised that pro se criminal defendants lack

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* Professor, Department of Criminal Justice and Criminology, Loyola University Chicago; Ph.D., Arizona State University (1990); J.D., DePaul College of Law (1975); B.S., University of Illinois (1972).

1 Teegarden v. Dir., Ark. Emp't Sec. Div., 591 S.W.2d 675, 678 (Ark. Ct. App.) (Newburn, J., dissenting).

2 I use the acronym SRL to refer collectively to both pro se civil litigants and criminal defendants.

a constitutional right to personal instruction from trial judges about courtroom procedures. Yet, these same pro se defendants are obligated to comply with the same judicial rules – about which they receive no instruction – as represented parties. Part II notes that the Supreme Court recently recognized there is an asymmetry of representation in cases involving SRLs with lawyer adversaries, and that due process requires some substitute procedural safeguards to address this asymmetry.

Part III presents the results of a review of over 300 federal circuit court opinions involving various forms of judicial assistance – to include providing information to, and making accommodations for – SRLs. The decisions are categorized by the nature of assistance provided (or refused), and whether each was found to be required, permissible, or impermissible. Lastly, Part IV discusses the role of judicial ethics, and the modification to the ABA Model Code of Judicial Conduct bearing upon this issue.

The Article concludes that the evolution of federal appellate courts' position on assistance to SRLs, as slow as it has been, is a welcome change. It is the Supreme Court which must now catch up to lower federal courts and modify its strict no-assistance policy, consistent with due process and the judicial duty to ensure SRLs a fair trial.

PART I – SOURCE OF THE RIGHT TO SELF-REPRESENTATION

A. Self-Representation in Criminal Cases

The constitutional right of self-representation in the U.S. was established for criminal cases in Faretta v. California,[3] in which a defendant appealed his conviction on grounds that the trial court denied him the right to represent himself. Justice Stewart wrote, in the majority's 5-4 decision, that the issue was "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so."[4]

Defendant Faretta once represented himself, with only a high school education, because he was afraid the public defender's heavy case load would hinder his defense. [5] After first accepting the Defendant's waiver of counsel, the trial judge held another hearing questioning him about his knowledge of the hearsay rule, and state jury-selection law

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3 3*See* Faretta v. California,422 U.S. 806 (1975).

4 *Id.* at 807.

5 *Id.*

governing. The judge then reversed himself, holding that Faretta had no constitutional right to self-representation.[6] Faretta was not allowed to participate in his own defense, and was subsequently found guilty and sentenced to prison for grand theft.[7]

The Court supported its decision that the Sixth Amendment, guaranteeing the right to the "assistance of counsel," implied a right to self-representation in part by a review of the common law. Historically, counsel was not permitted to appear for defendants in felony cases before the 17th century; it was not until passage of the Treason Act in 1695 that lawyers could present a defense for a defendant charged with treason.[8] It was not until 1836 that the ban on counsel for the defense in felony cases was eliminated.[9]

In the colonies, anti-lawyer sentiment persisted based on colonists' experience with representatives of the Crown and the King's Justice Courts, which were bent on conviction of those who opposed to the King's prerogatives.[10] Over time, colonial judges began to relax the prohibition of counsel, and eventually, after the Revolution, many colonial charters and declarations of rights included the right to counsel. Eventually, a right to self-representation was established with the enactment of the Judiciary Act of 1789.[11]

B. Self-Representation in Civil Cases

The Supreme Court has not expressly recognized a right to self-representation in civil cases. However, the Court's jurisprudence reveals that the right to self-representation, while not expressly referred to, is impliedly protected under several constitutional bases. First, the Court in Corfield v. Coryell held that the privileges and immunities clause of Article IV, Section 2, Clause 1[12] includes the "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[13] One

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6 *Id.* at 809.

7 *Id.*

8 *Id.* at 824-25.

9 *Id.* at 825.

10 *Id.* at 826-27.

11 *Id.* at 831. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789). *See* 28 U.S.C. § 1654 (2018).

12 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

13 6 F. Cas. 546, 551 (C.C.E.D.Pa. 1823) (No. 3230).

of these rights is "to institute and maintain actions of any kind in the courts of the state."[14]

The Court in Chambers v. Baltimore & Ohio Ry. Co. held that the First Amendment right to petition the government for redress of grievances includes "[t]he right to sue and defend in the courts." [15] It is "the alternative of force," a "right conservative of all other rights," "the foundation of an orderly government," "one of the highest and most essential privileges of citizenship," a "right not to be denied by states against those of other states," and thus is "protected by the federal Constitution."[16]

More recently, a series of Supreme Court decisions held that the Due Process Clause in Section 1 of the Fourteenth Amendment includes a right of access to courts. The right of access to courts is traced to two lines of cases: one involving prisoners' rights and another establishing the rights of non-prisoner litigants. Regarding prisoners' rights, Johnson v. Avery struck down prison regulation prohibiting inmates from assisting each other to prepare habeas corpus petitions and other legal action.[17] Wolff v. McDonnell extended Johnson to prisoners' civil rights complaints.[18] Ross v. Moffitt held that "meaningful access" to courts requires states to "assure the indigent defendant an adequate opportunity to present his claims fairly.[19] Additionally, in Smith v. Bounds the Court held that "the fundamental constitutional right of access to the courts require[s] prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law," such as paralegals or law students.[20]

For non-prisoners, the Court in Boddie v. Connecticut, struck down a statute requiring payment of filing fees for divorce petitions that made no accommodation for indigent parties unable to pay such fees. The statute was held to violate due process, and thus denied indigent parties'

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14 *Id.* In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court rejected the fundamental-rights approach, holding that privileges and immunities of citizens of the United States, referred to in the 14th Amendment, § 1 (as distinguished from those of citizens of the several States referred to in Art. IV, § 2, cl. 1) are those the Court has in its decisions recognized. This includes the right "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, [and] to engage in administering its functions," citing Crandall v. Nevada, 73 U.S. (6 Wall) 35, 39 (1868).

15 Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 148 (1907).

16 *Id.*

17 Johnson v. Avery, 393 U.S. 483 (1969).

18 Wolff v. McDonnell, 418 U.S. 539, 577-580 (1974).

19 Ross v. Moffitt, 417 U.S. 600, 616 (1974).

20 Bounds v. Smith, 430 U.S. 817, 828 (1977).

right of access to courts.[21] Tennessee v. Lane then recognized the fundamental right of access to the courts which is "protected by the Due Process Clause of the Fourteenth Amendment."[22] The Court in Lane noted that "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts."[23]

This summary review of the Supreme Court's jurisprudence clearly establishes the right to self-representation in criminal cases. A similar right can be implied from additional rulings by the Court establishing a right to sue or defend in courts, the right to petition the government for redress of grievances, and the right of access to courts. None of the aforementioned rulings recognizing these rights is limited to litigants who are represented. The question, therefore, becomes: If the right to self-representation in criminal and civil cases is of a constitutional dimension, to what extent do courts have an obligation to ensure that SRLs can meaningfully exercise the right by some form of judicial assistance?

PART II –SUPREME COURT DECISIONS ON JUDICIAL ASSISTANCE

In Faretta, the Court noted that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts . . . [but] it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense."[24] The latter statement was followed by footnote 46, which indicated that the trial judge could appoint – over the objection of the accused – standby counsel "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."[25] So, appointment of

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21 Boddie v. Connecticut, 401 U.S. 371 (1971).

22 Tennessee v. Lane, 541 U.S. 509, 523 (2004).

23 *Id.* at 533 (emphasis added). Judges may complain of the general concept of judicial assistance to SRLs based on the inconvenience of having to instruct SRLs on courtroom procedure and other matters. But this comment in *Lane* supports the view that inconvenience to the court alone is not a justification for judges' refusal to assist SRLs in exercising their constitutional right to personally assert their claims and defenses.

24 Faretta v. Cal., 422 U.S. 806, 834 (1975). "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" Quoting Ill. v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

25 *Faretta*, 422 U.S. at 834, n. 46.

standby counsel is one form of discretionary, permissible judicial assistance authorized by the Court.

The Supreme Court next addressed the question of the extent to which SRLs are entitled to assistance in McKaskle v. Wiggins,[26] a case involving a pro se criminal defendant for whom two standby counsel were appointed for his state robbery trial. Defendant Wiggins complained that the extent of standby counsels' involvement during his trial had "unfairly interfered with the presentation of his defense."[27] Wiggens argued that "his Faretta right to present his defense pro se was impaired by the distracting, intrusive, and unsolicited participation of counsel throughout the trial."[28] The Court noted that "[t]he pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial."[29] The Court found Wiggins had in fact been afforded those rights, and denied his appeal.[30]

In the course of its decision regarding the extent of Wiggins' standby counsels' participation, the Court stated that the right to self-representation is not infringed, "when standby counsel assists the pro se defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure."[31] Two sentences later the Court made the following point, which has been relied upon by many judges as a justification for not providing assistance to SRLs:

A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course. Faretta recognized as much. 'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law',[32]

Wiggins therefore holds that the trial judge may assist a pro se defendant by appointing standby counsel to help the pro se defendant

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26 McKaskle v. Wiggins, 465 U.S. 168 (1984).

27 *Id.* at 173.

28 *Id.* at 176.

29 *Id.* at 174.

30 *Id.* at 175.

31 *Id.* at 183.

32 *Id.* at 183-84 (quoting Faretta v. Cal., 422 U.S. 806, 834 n.46 (1975)).

with "overcoming routine procedural or evidentiary obstacles to the completion of some specific task" and complying with "basic rules of courtroom protocol and procedure,"[33] but simultaneously advises judges that they themselves need not provide similar assistance. The obvious but unstated concern of the Court is that judges will lose their impartiality by providing the assistance only standby counsel could provide. But, if no standby counsel is provided, and judges follow the no-right-to-personal-instruction-on-courtroom-procedure rule, how will SRLs be able to meaningfully invoke their constitutional rights to self-representation and access to courts?

So, the Court, on the one hand, requires SRLs to comply with the same rules of procedure and evidence as represented parties. But, on the other hand, it declares that they have no right to be informed of what those rules are. Despite denying them a right to be informed of court procedures, the Court in subsequent opinions held that judges should provide SRLs with certain forms of assistance or accommodation.

The Supreme Court as early as 1866 recognized the challenges facing SRLs not skilled in the law. In Purcell v. Miner, a property dispute between two SRLs who each claimed title to certain property, the Court noted that,

> [a] good deal of testimony was taken, [with] many of the interrogatories – the parties managing their own case – being of a most leading character. The case appears to have been carried on by the parties propriâ personâ, who are excusable for their ignorance of all the rules of pleading and practice in a court of chancery, or the proper mode of taking testimony.[34]

Modernly, the Court, in reversing an order dismissing a prisoner SRL's civil rights complaint, admonished lower courts in Haines v. Kerner that civil SRLs' pleadings, "however inartfully pleaded," are to be held to "less stringent standards than formal pleadings drafted by lawyers," because they are "entitled to an opportunity to offer proof."[35] In Title VII cases, the Court held that "a technical reading [of Title VII] would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[36]

The Court also held that affirmative notice and warnings to habeas petitioners are required of trial judges who consider recharacterizing a prisoner's motion as his or her first habeas petition:

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33 *Id.* at 183.

34 71 U.S. 513 (1866).

35 404 U.S. 519 (1972) (emphasis added). Pro se "pleadings" has now been expanded to "documents" generally. Erickson v. Pardus, 551 U.S. 89, 94 (2007).

36 Zipes v. Trans World Airlines, 455 U.S. 385, 397 (1982) (quoting Love v. Pullman Co., 404 U.S. 522, 527 (1972)).

> [T] he court cannot so recharacterize a pro se litigant's motion as the litigant's first § 2255 motion unless the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing.[37]

The Court further explained that:

> the very point of the warning is to help the pro se litigant understand not only (1) whether he should withdraw or amend his motion, but also (2) whether he should contest the recharacterization, say, on appeal. The "lack of warning" prevents his making an informed judgment in respect to the latter just as it does in respect to the former. Indeed, an unwarned pro se litigant's failure to appeal a recharacterization simply underscores the practical importance of providing the warning. Hence, an unwarned recharacterization cannot count as a § 2255 motion for purposes of the "second or successive" provision, whether the unwarned pro se litigant does, or does not, take an appeal.[38]

In addition to requiring judges to warn habeas petitioners of their intended recharacterization of their petitions, the Court cautioned trial judges against interpreting the procedural prescriptions in federal habeas case law that would "trap the unwary pro se prisoner."[39]

Another line of cases giving SRLs latitude are those dealing with the sufficiency of notices of appeal. The Court in Coppedge v. U.S., for example, took a "liberal view of papers" filed by pro se prisoners, and found them to be "equivalents of notices of appeal" despite technical deficiencies.[40] This "functional-equivalent doctrine," allowing non-compliant papers to satisfy the relevant notice-of-appeal rule, was held in Coppedge and other subsequent decisions[41] to properly invoke the

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37 Castro v. United States, 540 U.S. 375, 377 (2003).

38 *Id.* at 384. (emphasis added).

39 Slack v. McDaniel, 529 U.S. 473, 487 (2000) (quoting Rose v. Lundy, 455 U.S. 509, 520 (1982). *Cf.*, Day v. McDonough, 547 U.S. 198 (2006), holding that when the court in a habeas proceeding determines that the state has a timeliness defense to the petition that was not raised, it "might have informed the State of its obvious computation error and entertained an amendment to the State's answer." *Day* at 215. But, "We stress that a district court is not required to doublecheck the State's math. If, as this Court has held, '[d]istrict judges have no obligation to act as counsel or paralegal to pro se litigants,' . . , then, by the same token, they surely have no obligation to assist attorneys representing the State." *Day* at 209-10 (internal citations omitted).

40 Coppedge v. United States, 369 U.S. 438, 443, n.5 (1962).

41 *See, e.g.*, Fallen v. United States, 378 U.S. 139 (1964) (letter to sentencing court held sufficient), *superseded by statute on other grounds*; Carlisle v. United States, 517 U.S. 416 (1996); Foman v. Davis, 371 U.S. 178 (1962) (one early and one late notice and a post-trial motion collectively held effective though technically deficient); Smith v. Barry, 502 U.S. 244 (1992) (premature notice and appellate brief filing within time for filing notice of appeal held sufficient); Becker v. Montgomery, 582 U.S. 757, 767 (2001) (where appellant filed a notice of appeal with a typed instead of a required original signature, "imperfections in noticing an appeal should not be

appellate court's jurisdiction because they reflected the inmate's intent to take an appeal from the judgment of the district court.[42]

Yet, additional language justifying federal courts' refusal to assist or provide procedural information to pro se litigants is summarized in the following passage from Pliler v. Ford,[43] a recent habeas case:

District judges have no obligation to act as counsel or paralegal to pro se litigants . . . Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a pro se litigant in such a manner would undermine district judges' role as impartial decisionmakers. And, to the extent that respondent is concerned with a district court's potential to mislead pro se habeas petitioners, the warnings respondent advocates run the risk of being misleading themselves.[44]

While repeating some of its stern, early language about trial judges not being required to personally instruct SRLs or be an advocate for them, the Court at the same time not only imposes a duty of liberality in interpretation of their pleadings and submissions generally, it has gone further to impose certain duties upon trial judge to provide "unwary pro se prisoners" – as well as the state – proper notice and opportunity to respond to procedural traps that may deny them their day in court on the merits of their claims or defenses. Thus, we see that the Court has given trial and appellate courts mixed messages about their obligations to SRLs. Depending on the type of case brought, the cooperativeness of the SRL, the philosophy of the trial judge about pro se litigation generally, and other factors make it such that some SRLs receive notices, warnings, and accommodations, while others do not, without a clear standard distinguishing who is entitled to them and who is not.

While many of the cases cited above involve prisoners, in Turner v. Rogers the Court held that Rogers, a civil pro se litigant defending against a contempt citation in a child support matter,

did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided

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fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court.").

42 Lower courts have recognized the distinction between pro se non-compliance with rules versus imperfect compliance. Latitude has been given to those litigants in cases of imperfect compliance with pleading rules. *See* United States v. $41,320 U.S. Currency, 2014 WL 6698426 (D. Maryland).

43 Pliler v. Ford, 542 U.S. 225 (2004) (district courts are not required to give the particular advisements required by the Ninth Circuit before dismissing a pro se petitioner's mixed habeas petition).

44 *Id.* at 231-32 (citations omitted). *See also* McNeil v. United States, 508 U.S. 106, 113 (1993) (the Supreme Court has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.").

him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause.[45]

The Court, analyzing the application of the Mathews v. Eldridge[46] procedural due process factors, concluded that due process did not require the appointment of counsel for the respondent SRL. The Court noted one of the problems with granting the right to legal counsel to respondents in child support cases, namely, that – because most petitioners in such cases are single mothers without counsel – the right would create "an asymmetry of representation"[47] that would significantly alter the nature of the proceedings. Introducing counsel into the proceedings "could mean a degree of formality or delay" that would unduly slow payments to those in need of child support, and "could make the proceedings less fair overall," increasing the risk of erroneous decisions that would deprive families of needed support.[48] This language indicates this Court's schizophrenic sensitivity to the challenge facing an SRL who attempts to litigate a claim or defense against a represented party, as occurred in this case.

Turner is also relevant to the treatment of SRLs because of the Court's reasoning, which included a reference to the fact that there were "substitute procedural safeguards"[49] that made it less necessary to establish a right to counsel in civil contempt cases. The Court noted the existing procedure in that case provided for "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay."[50] The Court ultimately relied upon the existence of these procedural safeguards in holding that the Due Process Clause, does not automatically require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned

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45 .Turner v. Rogers, 564 U.S. 431, 449 (2011).

46 Mathews v. Eldridge, 424 U.S. 319 (1976).

47 *Turner*, 564 U.S. at 447.

48 *Id.*

49 *Id.*,(quoting *Mathews v. Eldridge*, 424 U.S. at 435).

50 564 U.S. at 447-48.

(adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings)."[51]

The bad news is that Turner represents the death knell for efforts of civil libertarians to persuade the Supreme Court to recognize an indigent's right to assistance of counsel in civil cases. The good news is that the Court recognized for the first time that SRLs face an "asymmetry of representation," and that states must provide certain "alternative procedures" for them in civil cases, such as child support matters which could result in incarceration, as a matter of due process. Whether the Court will require such alternative procedures to the assistance of counsel for federal cases, such as judicial assistance, or some other forms of accommodation, remains to be seen. In the meantime, lower federal courts have ruled in a variety of civil and criminal contexts that judges are required to provide a range of forms of assistance, as described in Part III.

In sum, self-representation is a constitutional and statutory right under federal law. The Supreme Court's jurisprudence on the subject is sparse and contradictory with respect to whether assistance in the form of warnings or otherwise is required, and under what circumstances. Judges or appellate courts less sympathetic to SRLs, who take a hard line, no-assistance approach, often rely upon the Court's early language stating that they have no constitutional right to "personal instruction" from the trial judge.

Given the confusion and lack of uniformity on the issue, Part III provides guidance for trial judges by summarizing federal appellate decisions addressing the various forms of required, permissible, and impermissible forms of judicial assistance.

PART III –COMPARATIVE ANALYSIS OF REQUIRED, PERMISSIBLE, AND IMPERMISSIBLE JUDICIAL ASSISTANCE

"Assistance" to SRLs has been variously referred to by courts as accommodations, allowances, leeway, solicitude, latitude, and similar terms.[52] I use "assistance" in this Article to include all such synonyms.

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51 *Id.* at 448.

52 Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir.1983) ("[i]mplicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training."); *see also* Ruotolo v. I.R.S., 28 F.3d 6, 8 (2d Cir. 1994) (recognizing that pro se litigants must be accorded "special solicitude"); McPherson v. Coombe, 174 F.3d 276, 280–81 (2d Cir. 1999) (court errs by failing to advise a pro se litigant of the nature of such a motion and the consequences of failing to respond to it properly, unless the opposing party has already provided the pro se litigant with such notice or it is otherwise clear from the record that the pro se litigant understands the nature of the

Fitting them into a typology for judges' guidance is not easy because of the variety of forms and contexts in which the question of assistance arises.

The decision of a judge to assist or not assist SRLs – however "assistance" is defined – is affected by multiple variables. The judge's philosophy regarding self-representation generally will certainly affect his or her decision to assist or not. Some judges believe strongly that the SRL has "made his bed and must now lie in it," and are opposed to pro se litigation generally. Other judges are more sympathetic to the plight of SRLs who have a legitimate claim or defense, and who are thwarted from accomplishing their legal objective due to lack of knowledge of substantive law, procedure, or both. Whether the SRL is a prisoner or not may also affect the assistance decision. Whether the SRL is "forced" to represent him or herself for economic reasons or is doing so voluntarily is another factor in a judge's assistance decision. The complexity of the case and the relative competence of the SRL to litigate it are also relevant. A judge may believe that assistance, where warranted, is more justified in a criminal versus a civil case. One SRL may be granted more assistance than another because he or she is more sympathetic than another. The procedural posture of the case will also be a factor in a judge's decision to provide or refuse assistance. Additionally, assistance may be warranted at one stage of the litigation but not another.

Creating a typology of forms of assistance is challenging. "Active" and "passive" is one way to categorize and distinguish between forms of assistance. Active assistance would mean, for example, providing a notice or warning about a matter of procedure or substance, or otherwise actively assisting the SRL to accomplish what he or she is trying to do. Passive assistance would include allowing the filing of a late paper where there has been imperfect rule compliance, rather than non-compliance. Assistance could also be categorized by the stage or posture of the litigation; it could be categorized as taking pretrial, trial, or post-trial forms. In addition, the distinction between procedure and substance might be another way to categorize forms of assistance, such that a judge

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motion); Tabron v. Grace, 6 F.3d 147, 153 n. 2 (3d Cir.1993) ("we have traditionally given pro se litigants greater leeway where they have not followed the technical rules of pleading and procedure"); Philos Technologies, Inc. v. Philos & D, Inc., 645 F.3d 851, 858-59 (7th Cir. 2011) (heightened judicial solicitude is justified in light of the difficulties of the pro se litigant in mastering the procedural and substantive requirements of the legal structure);; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (some allowances are made for the pro se plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements); United States v. Ly, 646 F.3d 1307, 1316-17 (11th Cir. 2011) ("[I]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training;" pro se party's misunderstanding drove his decision not to testify; by not correcting Ly's misunderstanding, the court reinforced Ly's mistaken view).

may believe the former is proper, but not the latter.[53] This of course raises the question of what is "substance" and "procedure," a question not easily answered. Despite the categorization, a judge would still need to know whether this or that form of assistance at this or that trial stage is required, permissible, or impermissible.

After reviewing over 300 federal decisions, I have found it preferable to group assistance forms based both on (1) their nature, as, e.g., relating to the right to (or waiver of) counsel, pleadings, notices or warnings, discovery, opportunities granted, evidentiary rulings or testimony, and (2) whether the assistance falls into the required, permissible, or impermissible categories. These are presented in the followed three tables. Not every category in the tables below has examples of each form of assistance. The sample size is limited to federal appellate cases on the subject, retrieved using multiple search queries relating to SRLs and judicial assistance, broadly defined. There are far more district court decisions on the subject, but their analysis is a matter for future research. Both civil and criminal cases noting required, permissible, or impermissible forms of judicial assistance are presented.

Table 1. Required Assistance[54]

Counsel or Waiver of Counsel (Criminal)
It is important for trial courts to do all in their power to ensure every defendant, from the most cooperative to the most obstreperous, is informed of the risks of proceeding pro se and is prevented from waiving counsel without sufficient knowledge of the protections he is surrendering. Before a court concludes a defendant has knowingly waived his right to counsel, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." To that end, the best practice is for district courts to begin by attempting to engage the defendant in a full discussion of the dangers of self-

53 *See* Jona Goldschmidt, et al., *Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants,* 30 WINDSOR Y.B. ON ACCESS TO JUST. 139, 170-71 (2012) (noting that the survey of family lawyers do not object to "procedural" assistance but do object to the court giving "substantive" assistance).

54 Here and in the next two tables I generally paraphrase the holding, but in some cases quote directly from the court's opinion.

representation whenever a defendant expresses a desire to waive his right to counsel, whether affirmatively or by his conduct.[55]
"A more searching or formal inquiry" is required when a defendant wishes to waive his right to counsel at trial because "the full dangers and disadvantages of self-representation" are more substantial and less obvious at trial than during earlier stages of criminal proceedings.[56]
SRL should be permitted to proceed pro se even if he had counsel pretrial.[57]
"If the appointment of new counsel is not warranted, it can be denied. If a defendant refuses to proceed with counsel and also refuses to proceed pro se, the proper course is to move forward with existing counsel. This approach preserves the right to counsel-which is the presumptive default position-while allowing the court to manage the case."[58]
While appointment of standby counsel is preferred, the presence of advisory counsel in the courtroom or the defendant's acquiescence in counsel's participation does not, by itself, relieve the district court of its responsibility to ensure that defendant's waiver of counsel is knowingly and intelligently made. Anything less than

[55] United States v. Garey, 540 F.3d 1253, 1267-68 (11th Cir. 2008). "So long as the trial court is assured the defendant (1) understands the choices before him, (2) knows the potential dangers of proceeding pro se, and (3) has rejected the lawyer to whom he is constitutionally entitled, the court may, in the exercise of its discretion, discharge counsel or (preferably, as occurred here) provide for counsel to remain in a standby capacity. In such cases, a *Faretta*-like monologue will suffice." *Id.* at 1267-68. This states the general rule announced in *Faretta v. California*, 422 U.S. 806, 834 (1975) ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'," citing Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).

[56] Patterson v. Illinois, 487 U.S. 285, 298-99 (1988) ("[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial."); *see also* Iowa v. Tovar, 541 U.S. 77, 89 (2004) ("Warnings of the pitfalls of proceeding to trial without counsel ... must be rigorously conveyed.").

[57] It is equally true, however, that a defendant's "pre-trial decision to proceed with counsel does not constitute an absolute waiver of his right to represent himself." . . . The principal focus of a trial judge's colloquy should be to determine whether the accused has "knowingly and intelligently" elected to relinquish the benefits of appointed counsel. . . . Where a *pro se* defendant lacks the ability to defend himself adequately or vacillates in his resolve to continue without representation, the judge can appoint stand-by counsel to assist the defendant in representing himself. . . . The entire procedure requires "not only an intricate assessment of the defendant's intent, knowledge, and capacity, but a strong measure of patience as well." Williams v. Bartlett, 44 F.3d 95, 100 (2d Cir. 1994).

[58] Fischetti v. Johnson, 384 F.3d 140, 147 (3d Cir. 2004).

full representation by counsel raises the question of valid waiver of the right to counsel. Even if appointment of standby counsel is contemplated, the district court must fulfill its affirmative responsibility of ensuring defendant is aware of the hazards and disadvantages of self-representation.[59]
A potentially unruly defendant may and should be clearly forewarned that deliberate dilatory or obstructive behavior may operate in effect as a waiver of his pro se rights and, in that event, amicus [standby counsel] will be ready to assume exclusive control of the defense.[60]
In habeas proceeding, post-trial letter to state court by self-represented prisoner requesting appointment of counsel, supplemented by father's letter describing defendant's indigency, that were not acted upon by trial judge, are sufficient to establish a violation of right to counsel on appeal.[61]
Given the complexity of the (*Bivens* action) case, a competent appointed counsel could have made a difference in the outcome; a lawyer would have been able to help the SRL untangle the medical and legal questions in the case, and the court would probably not have granted summary judgment had counsel been appointed. The court abused its discretion in denying the motion for appointed counsel.[62]
Pleadings
An SRL's se complaint is to be read liberally. The court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.[63]

[59] United States v. Padilla, 819 F.2d 952, 959-60 (10th Cir. 1987).

[60] United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972). *See* Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are they Phone Psychics? Theatrical Understudies? Or Both?* 24 SO. CAL. REV. L. & SOC. JUST. 133 (2015) (discussing the role of standby counsel and the standard for determining their effectiveness).

[61] Magee v. Payton, 343 F.2d 433, 435 (4th Cir. 1965) ("It is not disputed that the petitioner did not in fact have the assistance of counsel in appealing his conviction, and we think the letter from the petitioner's father constituted a sufficient assertion of indigency to eliminate any meritorious challenge on that point.").

[62] Gil v. Reed, 381 F.3d 649, 657 (7th Cir. 2004). *See also*, James v. Eli, 846 F.3d 951, 953 (7th Cir. 2017) ("[L]awsuits involving complex medical evidence are particularly challenging for pro se litigants. . . If a pro se plaintiff in such a case is unable despite his best efforts to obtain a lawyer and a medical expert, and if the case would have a chance of success were the plaintiff represented by counsel, the trial judge should endeavor to obtain them for him.") (citations omitted).

[63]Branum v. Clark, 927 F.2d 698 (2d Cir. 1991). *See also* Erickson v. Pardus, 551 U.S. 89, 94 (2007) "[A] pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers" (per curiam) (internal quotation marks omitted). This is particularly so when the plaintiff SRL alleges that her civil rights have been violated. McEachin,

SRL complaints are to be liberally construed, and courts may construe them as having named defendants who are mentioned only in the body, but not the caption, of the complaint.[64]
The fact is the SRL pointed to this [state-created danger] theory, which falls within the due process rubric he generally invoked. If the court can reasonably read pro se pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority and his confusion of various legal theories.[65]
A district court must examine the SRL's complaint to see whether the facts alleged, or the set of facts which the plaintiff might be able to prove, could very well provide a basis for recovery under any of the civil rights acts. The Court, in considering the defendants' motion to dismiss, will not permit technical pleading requirements to defeat the vindication of any constitutional rights which the SRL alleges, however inartfully, to have been infringed.[66]
As a matter of "best practices" or general guidance offered to all SRLs, they should be asked to organize their amended complaints along these lines: (i) the alleged act of misconduct; (ii) the date on which such misconduct occurred; (iii) the names of each and every individual who participated in such misconduct; (iv) where appropriate, the location where the alleged misconduct occurred; and, (v) the nexus between such misconduct and the SRL's civil and/or constitutional rights. However, a threat to dismiss the action for failure to comply with these requirements "is another matter altogether. Neither our rules nor our precedents authorize a district court to take such a step. As the Supreme Court has observed, 'Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.' Accordingly, a complaint need not contain detailed factual allegations—such as the dates of misconduct and the names

357 F.3d 197, 200 (2d Cir. 2004). The "dismissal of a pro se claim as insufficiently pleaded is appropriate only in the most unsustainable of cases." Boykin v. KeyCorp, 521 F.3d 202, 216 (2d Cir. 2008).

[64] Donald v. Cook County Sheriff's Dep't, 95 F.3d 548, 559 (7th Cir. 1996).

[65] Waugh v. Dow, 617 Fed. Appx. 867, 874-75 (10th Cir. 2015), citing Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

[66] Canty v. Richmond Police Dep't, 383 F. Supp. 1396, 1399-1400 (E.D.Va.1974), affirmed, 526 F.2d 587 (4 Cir. 1975), cert. denied, 423 U.S. 1062 (1976).

of 'each and every individual' involved in the misconduct. There is no basis for the imposition of such mandatory guidelines."[67]
District court should rule on plaintiff SRL's motion for appointment of counsel before dismissal.[68]
SRLs' imperfect compliance, as distinguished from non-compliance, requires courts to apply liberality to their papers. Appellate courts must apply notice-of-appeal requirements liberally in the case of prisoner SRLs and permit the filing of a document that is the functional equivalent of a notice of appeal even if imperfect in some respect where the prisoner "did all he could" under the circumstances.[69]
Notice or Warning[70]
Where an SRL fails to allege a jurisdictional amount or other basis for federal jurisdiction, the district court should apprise him of the availability of 42 U.S.C. s 1983 and 28 U.S.C. s 1343(3).[71]
District court should advise an Turner v. Rogers, 564 U.S. 431 (2011). SRL when the complaint omits an indispensable party from his complaint.[72]
In some circuits the court (or movant's counsel) is required to provide "fair notice" and instructions to SRLs regarding the manner of responding to a motion to dismiss or for summary judgment.[73]

[67] Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191-92 (2d Cir. 2008) (citations omitted).
[68] Brown–Bey v. United States, 720 F.2d 467, 471 (7th Cir. 1983).
[69] Fallen v. United States, 378 U.S. 139 (1964), *superseded by statute on other grounds as stated in* Carlisle v. United States, 517 U.S. 416 (1996). The "functional equivalent" principle was first applied in Coppedge v. United States, 369 U.S. 438, 444, n. 5 (1962) (noting that the principle is applied based on the "liberal view of papers filed by indigent and incarcerated defendants, as equivalent notices of appeal."). It was also applied in the non-prisoner (non-pro se) context in Foman v. Davis, 371 U.S. 178, 181 (1962) ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."). Then, in Smith v. Barry, 502 U.S. 244, 247-48 (1992), the Supreme Court held that a document filed in the circuit court pro se, intended to serve as an appellate brief, should qualify as a notice of appeal. See also, Becker v. Montgomery, 582 U.S. 757, 767 (2001) (imperfections in pro se prisoner's notice of appeal of the dismissal of his § 1983 complaint – here, inclusion of appellant's typed name without a signature – "should not be fatal where no genuine doubt exists about who is appealing, and from what judgment, to which appellate court.").
[70] Notices or warnings to SRLs are often equated with improper advocacy. The examples provided here show they are a requirement of due process and the judicial duty to ensure a fair trial.
[71] Burris v. State Dep't of Public Welfare, 491 F.2d 762 (4th Cir. 1974).
[72] Wilburn v. Escalderon, 789 F.2d 1328, 1332 (9th Cir. 1986).
[73] Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975); Timms v. Frank, 953 F.2d 281, 284 (7th Cir. 1992) (pro se litigants must be given notice of consequences of failing to file affidavits in response to motion for summary judgment). *Accord* Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 245 (3d Cir. 2013); Rand v. Rowland, 154 F.3d 952, 958-59 (9th Cir. 1998) (fair notice of the summary judgment requirement naturally follows from our policy of liberal construction in favor of pro se litigants; the purpose of the Federal Rules to eliminate "procedural booby traps" which could prevent "unsophisticated litigants" from ever having their day in court); Somerville v. Hall, 2 F.3d 1563, 1564 (11th Cir. 1993); Neal v. Kelly, 963 F.2d 453, 457 (D.C. Cir. 1992). *But see*

Court may require counsel for summary judgment movant to assist district judges in bearing their (the judges') burden of fair notice to include in their motions for summary judgment directed at actions by SRLs a short and plain statement of the manner in which to respond to such motions.[74]
The fair-notice requirement regarding summary judgment or motions to dismiss must be given contemporaneously with such motion filings.[75]
The district court should afford SRLs special solicitude before granting the [defendant's] motion for summary judgment. The court also has an obligation to make certain that the SRL is aware of and understands the consequences of their failure to comply with the Local Rules. Trial judges must make some effort to protect a party [proceeding pro se] from waiving a right to be heard because of his or her lack of legal knowledge.[76]
A district court errs in granting summary judgment against an SRL where it fails to treat his verified complaint as an affidavit.[77]

Klingele v. Eikenberry, 849 F.2d 409, 411 (9th Cir. 1988) (concluding that the rule applies only to pro se prisoners). Other courts have rejected the "fair notice" duty. McDaniels v. McKinna, 96 Fed.Appx. 575, *578 (10th Cir. 2004) ("While we construe pleadings filed by a *pro se* litigant liberally, the courts do not serve as the *pro se* litigant's advocate, and *pro se* litigants are expected to follow the Federal Rules of Civil Procedure, as all litigants must."); Williams v. Browman, 981 F.2d 901, 903–04 (6th Cir. 1992) (holding that such notice is unnecessary); Jacobsen v. Filler, 790 F.2d 1362, 1365-66 (9th Cir. 1986) (district court should not tell a plaintiff SRL how to respond to a motion for summary judgment and should refrain from open-ended participation in pro se civil cases); Martin v. Harrison Cnty. Jail, 975 F.2d 192, 193 (5th Cir. 1992) (same); Brock v. Hendershott, 840 F.2d 339, 342-43 (6th Cir. 1988) (District court did not err in advising SRLs that their response to defendants' first summary judgment motion could not be considered as a response to their second summary judgment motion: "We adopt this rule in this case. When a person such as either defendant in this case chooses to represent himself, he should expect no special treatment which prefers him over others who are represented by attorneys.").

[74] Neal v. Kelly, 963 F.2d 453, 456 (D.C. Cir. 1992). *See also* Woods v. Carey, 684 F.3d 934, 940, n. 6 (9th Cir. 2012) ("Because the defendants in pro se prisoner cases are ordinarily institutional officials or employees, and are represented by the Attorney General or other counsel regularly retained by the governmental entities involved, we express no view as to the methods the district court may employ, including sanctions, to ensure that defendants provide proper notice rather than imposing that burden on the overworked district courts.").

[75] Woods v. Carey, 684 F.3d at 939 ("The assumption that the required notice will be given contemporaneously with the summary judgment motion is prevalent, even though not explicitly announced by these courts as an affirmative requirement. Given that the purpose of the fair notice requirement is to ensure that unsophisticated and unassisted litigants do not succumb to 'procedural booby traps [that] could prevent [them] from ever having their day in court,' . . . it is essential that such notice be provided at the time when the defendants' motions are made, not a year or more in advance. Otherwise, the 'procedural booby traps' we sought to avoid . . . may well prevent pro se prisoners 'from ever having their day in court'.").

[76] Tracy v. Freshwater, 623 F.3d 90, 101-02 (2d Cir. 2010).

[77] *Neal* 963 F.2d at 457 .

An SRL should receive meaningful notice of what is required of him, but the court is not required or permitted to act as counsel for any party.[78]
Magistrate is required to provide SRL with notice of the right to object within 10 days of receipt of a Report and Recommendation to district court. If such notice is given and the report is not objected to, a district court's judgment based on the report may only be reversed upon plain error or manifest injustice.[79]
District court should have notified plaintiff SRL of consequences of failure to comply with briefing schedule before dismissing complaint).[80]
District courts should give SRL notice of need to file new notice of appeal after denial of Rule 59(e) motion).[81]
Before acting on its own initiative in a habeas proceeding where a calculation error has been made for limitations purposes, a court must accord the parties fair notice and an opportunity to present their positions.[82]
The district court may not use the same jury sequentially for two unrelated cases brought by an SRL unless he or she is fully informed and consent is given.[83]

[78] Schooley v. Kennedy, 712 F.2d 372, 373 (8th Cir. 1983).

[79] Douglas v. United Services Auto. Assoc., 79 F.3d 1415, 1428-29 (5th Cir. 1996) ("Because Douglass was not warned that failure to object to the legal conclusions in the magistrate judge's report and recommendation would restrict appellate review of them to plain error, he falls within an exception to our new appellate forfeiture rule for accepted unobjected-to proposed findings and conclusions.").

[80] Tucker v. Randall, 948 F.2d 388, 390 (7th Cir.1991).

[81] Averhart v. Arrendondo, 773 F.2d 919, 920 (7th Cir.1985) ("But we know from past experience that this particular wrinkle in the appellate rules [i.e., inter-relationship between Fed. R.Civ.P. 59(e) and F.R.App.P. 4(a)(4)] is a trap for the unwary into which many appellants, especially those not represented by counsel (and most prisoners are not), have fallen, with dire consequences since there is no way they can reinstate their appeal if the second notice of appeal is untimely. The mistake these litigants make is thoroughly understandable. The problem is not that Rule 4(a)(4) is unclear—it is not—but that it is complicated to a lay understanding and is buried in Rule 4 of the appellate rules, which anyway are less familiar than the rules of procedure. The idea that the first notice of appeal lapses rather than merely being suspended is not intuitive, so unless a litigant has a pretty good understanding of how Rule 59 of the procedure rules interacts with Rule 4 of the appellate rules, he is apt to fall into the same hole into which Mr. Averhart has disappeared. It seems hardly in keeping with the spirit of the federal rules to impose such forfeitures so regularly on persons without legal knowledge or representation.").

[82] Day v. McDonough, 547 U.S. 198, 210 (2006).

[83] Johnson v. Schmidt, 83 F.3d 37, 38-40 (2d Cir. 1996) ("The practice is fraught with dangers. First, if the evidence at the first trial persuades the jury that the plaintiff is not a credible witness, it will be very difficult for the same jury to make an independent assessment of the plaintiff's credibility at the trial of the second case. Second, evidence prejudicial to the plaintiff might be injected into the first trial, either by the defendants' design or through unexpected volunteering by a witness. If this occurs in the first trial, the plaintiff might be obliged to accept the limited comfort of a judge's 'curative' instruction to disregard the prejudicial testimony, but the use of the same

Opportunity Granted
The court should afford the prisoner SRL an opportunity to discover the identities of the proper defendants from the warden, from his personal knowledge, the personal knowledge of his subordinates, or the records of the institution, and should advise him how to proceed, or permit amendment of the pleadings to bring that person or persons before the court.[84]
A judge may not refuse to grant disabled SRL oral argument because of her disability, where she had no lawyer to argue in her place.[85]
Evidence or Testimony
Where a self-represented criminal defendant misunderstands his right to testify, believing he could only do so upon being questioned by a lawyer, district judge has a duty to correct his misunderstanding and advise him that he can testify in narrative form.[86]

jury to decide the second case unnecessarily subjects the plaintiff to the risk that the "cure" will not suffice.") at 38-39.

[84] Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir. 1978). *See also* Donald v. Cook County Sheriff's Dept., 95 F.3d 548, 555 (7th Cir. 1996) ("[W]hen the substance of a *pro se* civil rights complaint indicates the existence of claims against individual officials not specifically named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint. To the extent the plaintiff faces barriers to determining the identities of the unnamed defendants, the court must assist the plaintiff in conducting the necessary investigation."); Berndt v. State of Tenn., 796 F.2d 879, 881 (6th Cir. 1986) (remanding for amendment when "the complaint, in substance, clearly indicated that the [unnamed] staff and authorities [rather than the official body named as defendant] are the real parties-defendants" in spite of plaintiff's failure to request leave to amend); Maggette v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983) (prisoner SRL "should have the opportunity to amend his caption and serve the additional prison officials named or described in the complaint"); Wilger v. Dept. of Pensions and Sec., 593 F.2d 12, 13 (5th Cir. 1979) (remanding to provide "reasonable opportunity to amend" where "in their pro se complaint the [plaintiffs] made allegations which indicate that there may be individuals (whether state officials or others) who are amenable to suit in federal court"); Billman v. Ind. Dep't of Corr., 56 F.3d 785, 788–90 (7th Cir. 1995); Maclin v. Paulson, 627 F.2d 83, 87–88 (7th Cir. 1980) (when "party is ignorant of defendants' true identity, it is unnecessary to name them until their identity can be learned through discovery or through the aid of the trial court."); Munz v. Parr, 758 F.2d 1254, 1257 (8th Cir. 1985) ("dismissal is proper only when it appears that the true identity of the defendant cannot be learned through discovery or the court's intervention"); Santiago v. Wood, 904 F.2d 673 (11th Cir. 1990) (abuse of discretion to deny Rule 60(b) motion to amend complaint to name the appropriate institutional defendant).

[85] Reed v. Illinois, 808 F.3d 1103, 1108 (7th Cir. 2015)("Apt is the observation of the Supreme Court in Tennessee v. Lane, . . . that Title II of the ADA was passed in part to provide equal access to courts for the disabled: 'The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination'." *Id.* (citations omitted).

[86] United States v. Hung Thien Ly, 646 F.3d 1307, 1315-16 (11th Cir. 2011). *Cf.* United States v. Beckton, 740 F.3d 303, 307-08 (4th Cir. 2014) (trial judge did not deny self-represented defendant a fair trial by refusing to allow him to testify in narrative fashion and compelling him to choose

Table 2. Permissible Assistance

Counsel or Waiver of Counsel (Criminal)
The court's power to compel an attorney to continue through the trial as uncompensated, standby counsel in a criminal case is based not only on fairness to the defendant, but also on a court's inherent power to compel an attorney to continue to provide services at trial in order to further the efficient processing and disposition of its caseload.[87]
The court has discretion to appoint volunteer counsel if an indigent SRL with a meritorious case makes a reasonable but unsuccessful attempt to obtain counsel, unless the court determines that, given the difficulty of the case, the plaintiff appears competent to litigate it himself.[88]
Even if the right to self-representation has been validly invoked, a judge may qualify it by appointing standby counsel, with or without the defendant's consent, to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary or to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of her own clearly indicated goals.[89]
District court may permit hybrid representation in its discretion, but SRL does not have a constitutional right under the Sixth

between testifying pro se in question-answer form – in response to questions from standby counsel – or not testifying at all).

[87] United States v. Bertoli, 994 F.2d 1002, 1017 (3d Cir. 1993).

[88] Santiago v. Walls, 599 F.3d 749, 761 (7th Cir. 2010) (quoting Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007) (*en banc*)). Whether to recruit counsel "is a difficult decision: Almost everyone would benefit from having a lawyer, but there are too many indigent litigants and too few lawyers willing and able to volunteer for these cases. . . . Consequently, '[d]istrict courts are ... placed in the unenviable position of identifying, among the sea of people lacking counsel, those who need counsel the most'." Henderson v. Ghosh, 755 F.3d 559, 564 (7th Cir. 2014) (citations omitted). "In deciding whether the district court abused its discretion, we ask 'whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself.' . . . 'We ... examine both the difficulties posed by the particular case and the capabilities of the plaintiff to litigate such a case'." 755 F.3d at 565.

[89] Clark v. Perez, 510 F.3d 382, 395 (2d Cir. 2008). *Accord*: U.S. v. Johnson, 585 F.2d 374, 376 (8th Cir. 1978). Both cases rely upon Faretta v. California, 422 U.S. at 835, n. 46 ("A defendant who chooses to represent himself may request the court to appoint an 'advisory' or 'standby' counsel to assist him in the presentation of the defense.").

Amendment to combine self-representation with representation by counsel.[90]
In the face of the SRL's knowing and intelligent Sixth Amendment waiver, the district court does not violate his right to counsel by refusing to allow standby counsel to represent the runaway SRL during the final days of the trial.[91]
Co-counsel and advisory counsel are terms that have gained distinct meanings. "Advisory counsel is generally used to describe the situation when a self-represented defendant is given technical assistance by an attorney in the courtroom, but the attorney does not participate in the actual conduct of the trial. In the co-counsel situation, the attorney may participate directly in the trial proceedings with the defendant (examining witnesses, objecting to evidence, etc.). The Supreme Court and this circuit have recognized the efficacy of hybrid representation to aid *pro se* defendants and protect the integrity of the trial process."[92]
A trial judge does not violate a self-represented defendant's Sixth Amendment right to counsel by permitting standby counsel (only) to participate in bench conferences requested by either defendant or the prosecution.[93]
Requiring that defendant use advisory counsel and screen all motions through counsel is not an impermissible limitation on right of self-representation absent showing that participation of advisory counsel undermined jury perception of the *Faretta* right of self-representation, and trial court's admonitions, which occur outside jury's presence, appear to involve a need for assistance in procedural matters, and where there is no showing that counsel's participation eroded the self-represented defendant's actual control of the defense.[94]

[90] United States v. Tarantino, 846 F.2d 1384, 1420 (D.C. Cir. 1988), citing United States v. Mosely, 810 F.2d 93, 97 (6th Cir.), cert. denied, 484 U.S. 841, 108 S.Ct. 129, 98 L.Ed.2d 87 (1987); United States v. Nivica, 887 F.2d 1110, 1121 (1st Cir.1989) (This does not mean that hybrid representation is forbidden; rather, "it is to be employed sparingly and, as a rule, is available only in the district court's discretion."); United States. v. Campbell, 61 F.3d 976, 981 (1st Cir. 1995); United States v. Weisz, 718 F.2d 413, 425 (D.C. Cir. 1983).

[91] United States v. Stanley, 739 F.3d 633, 649 (11th Cir. 2014).

[92] Locks v. Sumner, 703 F.2d 403, 407 (9th Cir. 1983) ("We agree with the Tenth Circuit. If the right to co-counsel is not of constitutional dimension . . we fail to see why the right to advisory counsel should be afforded higher status. The decision to allow a defendant to proceed with either form of hybrid representation is best left to the sound discretion of the trial judge.") (citations omitted). *But see*, United States v. Olson, 576 F.2d 1267, 1270 (8th Cir. 1978) ("[W]e have rejected the view that a defendant has a right both to represent himself and to be represented by counsel even if a request for such hybrid representation is made.").

[93] Hicks v. Duncan, 173 F.3d 860, *1 (9th Cir. 1999).

[94] United States v. Walsh, 742 F.2d 1006, 1007 (6th Cir. 1984).

It is both permissible and good practice for a trial court to require that appointed counsel represent a self-represented defendant excluded from the courtroom for disruptive behavior.[95]
District court, in keeping with its broad supervisory powers, has broad discretion to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense.[96]
Appointment of Counsel (Civil)
In deciding to appoint volunteer counsel to an indigent, prisoner SRL, the court, in determining whether the latter can competently represent himself, may not take into consideration the fact that the prisoner has a jailhouse lawyer assisting him. The court should consider his educational level, IQ, functional literacy, experience with civil litigation, ability to investigate crucial facts, and the factual and legal complexity of the case.[97]
Pleadings
District court, in screening an SRL's complaint to decide if IFP (*in forma* pauperis) status is warranted or whether a 12(b)(6) motion should be granted, may clarify an unclear complaint by interviewing the SRL and making a transcript or recording of the interview (which will usually be conducted telephonically). The interview must be limited to elucidating the plaintiff's claim, and not allowed to become a determination of its merits. A judge who does not recruit a lawyer for the SRL in such a case should at least consider making a modest effort to assist the him in articulating his claims.[98]
Discovery
A judge may order simplified interrogatories so that the SRL could respond as simply and conveniently as possible. A judge may also grant the SRL an extension of time in which to respond to the discovery requests.[99]

[95] Davis v. Grant, 532 F.3d 132, 150 (2d Cir. 2008).

[96] United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998) ("The limits placed by the court on Lawrence's use of his standby counsel in this instance were reasonable. It simply restricted the standby counsel's advice to procedural matters.")

[97] Henderson v. Ghosh, 755 F.3d 559, 565-66 (7th Cir. 2014). A claim of abuse of discretion in refusing to appoint counsel requires a showing of prejudice. "As noted, prejudice in this context means 'a reasonable likelihood that the presence of counsel would have made a difference in the outcome of the litigation. . . .' '[P]rejudice may be established by a litigant's poor performance before or during trial." . . . If the plaintiff 'was incapable of engaging in any investigation[ ] or locating and presenting key witnesses or evidence' he can establish the requisite prejudice. . .'." *Id.* at 566.

[98] Beal v. Foster, 803 F.3d 356, 395 (7th Cir. 2015).

[99] Settle v. Brim, 1998 WL 738337, *1 (10th Cir. 1998).

District judge accommodated the SRL by rescheduling his deposition multiple times and ordering that the deposition take place at the courthouse in three sessions totaling no more than seven hours (based on plaintiff's alleged anxiety disorder).[100]
SRLs are granted special solicitude regarding court-ordered sanctions.[101]
Opportunity Granted (or Denied)
A trial judge does not violate self-represented defendant's Sixth Amendment right to counsel by permitting standby counsel (only) to participate in bench conferences requested by either defendant or the prosecution.[102]
Evidence or Testimony
A judge in a bench trial with a plaintiff SRL may request that certain individuals be the first witnesses, and may direct the defendants to proceed first in examining these witnesses. The court may ask all the witnesses a significant number of questions, at times dominating parts of the examination, and may permit the parties to make a liberal supplementation of the record upon conclusion of trial.[103]
The trial judge may question a witness if he deems it necessary to clarify a matter, or to develop more fully the facts for the benefit of the jury.[104]
District court may order the SRL to submit to the court and opposing counsel the questions he intends to ask witnesses on direct examination, where court received objections from the

[100] Manigualte v. C.W. Post of Long Island University, 533 Fed. Appx. 4, *5 (2d Cir. 2013).
[101] Int'l Business Properties v. ITT Sheraton Corp., 65 F.3d 175, *2 (9th Cir. 1995) ("We recognize that pro se litigants are granted special solicitude with regard to court-ordered sanctions.").
[102] Hicks v. Duncan, 173 F.3d 860, *1 (9th Cir. 1999).
[103] Cranberg v. Consumers Union of U.S., 756 F.2d 382, 391 (5th Cir. 1985) ("The judge's participation and evidentiary rulings tended to assist Cranberg, a *pro se* litigant who represented himself well, though he lacked familiarity with procedural rules. . . . When a *pro se* litigant, even one as skillful as Cranberg, goes to trial against a party represented by a member of the bar, the responsibility of the trial judge may warrant participation which differs markedly from what would be appropriate to a trial between adversaries represented by counsel. The record of this trial reveals a judge conscious of his duty and conscientious in its discharge. Rather than prejudicing Cranberg's position, we see the judge's efforts as attempts to enlighten it. We are satisfied that the measures taken below to develop and control the proof were reasonable and directed towards reaching a just decision." *Id.* at 392.)
[104] United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975). The court, however, also held: "For the trial judge to assume the responsibility of examining witnesses for either party would change the judicial role from one of impartiality to one of advocacy. The fact that a defendant represents himself does not alter the judicial role nor does it impose any new obligation on the trial judge. The defendant under those circumstances must assume the responsibility for his inability to elicit testimony." *Id.* at *12.

defendants so that it could rule upon them in advance of trial, and such a procedure is not a denial of due process.[105]
The district judge may raise objections on self-represented defendant's behalf and give him certain legal advice.[106]
The trial judge may assist SRL by correcting some of her misunderstandings of law and instructing her on what kind of proof she needs offer.[107]
A trial court may ask questions for such purposes as clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings.[108]
The trial judge may actively participate and give his own impressions of the evidence or question witnesses, as an aid to the jury, so long as he does not step across the line and become an advocate for one side.[109].

Table 3. Impermissible Assistance

Counsel or Waiver of Counsel (Criminal)
The court's power to compel an attorney to continue through the trial as uncompensated, standby counsel in a criminal case is based not only on fairness to the defendant, but also on a court's inherent power to compel an attorney to continue to provide services at trial

[105] Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486, 487 (9th Cir. 1986) ("In devising this unusual procedure, the court made it clear that it was doing so in order to help the trial proceed more efficiently, to assist the pro se plaintiff in presenting his case to the jury, and to avoid unnecessary expense, confusion and embarrassment for him during the trial. In a post-trial conference, the district court articulated, for purposes of making a record for this anticipated appeal, the difficulties that trial courts face in trying civil cases before a jury when the plaintiff is not represented by counsel. The district judge described the problems that arise when a pro se plaintiff attempts to question himself, including the incessant objections from opposing counsel. The district court concluded that 'these [section 1983 pro se trials] are the most difficult cases we have in the district court'.").

[106] United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984) (citations omitted) ("A pro se defendant is subject to the same rules of procedure and evidence as defendants who are represented by counsel. . . . The district judge was extremely solicitous in handling Merrill's trial, and appointed advisory counsel to assist Merrill in the conduct of his pro se defense. On repeated occasions, the judge raised objections to evidence offered by the prosecution. Similarly, more than once during the trial, the judge excluded government counsel from the courtroom and provided Merrill with sound legal advice. The district judge made every reasonable effort to protect Merrill's right to a fair trial as well as his right to represent himself.").

[107] Scott v. Rosenthal, 53 Fed. Appx. 137, 142 (2d Cir. 2002).

[108] United States v. Filani, 74 F.3d 378, 386 (2d Cir.1996).

[109] *Id.* at 385.

in order to further the efficient processing and disposition of its caseload.[110]
The court has discretion to appoint volunteer counsel if an indigent SRL with a meritorious case makes a reasonable but unsuccessful attempt to obtain counsel, unless the court determines that, given the difficulty of the case, the plaintiff appears competent to litigate it himself.[111]
Even if the right to self-representation has been validly invoked, a judge may qualify it by appointing standby counsel, with or without the defendant's consent, to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary or to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of her own clearly indicated goals.[112]
District court may permit hybrid representation in its discretion, but SRL does not have a constitutional right under the Sixth Amendment to combine self-representation with representation by counsel.[113]
In the face of the SRL's knowing and intelligent Sixth Amendment waiver, the district court does not violate his right to counsel by refusing to allow standby counsel to represent the runaway SRL during the final days of the trial.[114]

[110] United States v. Bertoli, 994 F.2d 1002, 1017 (3d Cir. 1993).

[111] Santiago v. Walls, 599 F.3d 749, 761 (7th Cir. 2010) (quoting Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007) (*en banc*)). Whether to recruit counsel "is a difficult decision: Almost everyone would benefit from having a lawyer, but there are too many indigent litigants and too few lawyers willing and able to volunteer for these cases. . . . Consequently, '[d]istrict courts are ... placed in the unenviable position of identifying, among the sea of people lacking counsel, those who need counsel the most'." Henderson v. Ghosh, 755 F.3d 559, 564 (7th Cir. 2014) (citations omitted). "In deciding whether the district court abused its discretion, we ask 'whether the difficulty of the case—factually and legally—exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself.' . . . 'We ... examine both the difficulties posed by the particular case and the capabilities of the plaintiff to litigate such a case'." 755 F.3d at 565.

[112] Clark v. Perez, 510 F.3d 382, 395 (2d Cir. 2008). *Accord*: U.S. v. Johnson, 585 F.2d 374, 376 (8th Cir. 1978). Both cases rely upon Faretta v. California, 422 U.S. at 835, n. 46 ("A defendant who chooses to represent himself may request the court to appoint an 'advisory' or 'standby' counsel to assist him in the presentation of the defense.").

[113] United States v. Tarantino, 846 F.2d 1384, 1420 (D.C. Cir. 1988), citing United States v. Mosely, 810 F.2d 93, 97 (6th Cir.), cert. denied, 484 U.S. 841, 108 S.Ct. 129, 98 L.Ed.2d 87 (1987); United States v. Nivica, 887 F.2d 1110, 1121 (1st Cir.1989) (This does not mean that hybrid representation is forbidden; rather, "it is to be employed sparingly and, as a rule, is available only in the district court's discretion."); United States. v. Campbell, 61 F.3d 976, 981 (1st Cir. 1995); United States v. Weisz, 718 F.2d 413, 425 (D.C. Cir. 1983).

[114] United States v. Stanley, 739 F.3d 633, 649 (11th Cir. 2014).

Co-counsel and advisory counsel are terms that have gained distinct meanings. "Advisory counsel is generally used to describe the situation when a self-represented defendant is given technical assistance by an attorney in the courtroom, but the attorney does not participate in the actual conduct of the trial. In the co-counsel situation, the attorney may participate directly in the trial proceedings with the defendant (examining witnesses, objecting to evidence, etc.). The Supreme Court and this circuit have recognized the efficacy of hybrid representation to aid *pro se* defendants and protect the integrity of the trial process."[115]
A trial judge does not violate a self-represented defendant's Sixth Amendment right to counsel by permitting standby counsel (only) to participate in bench conferences requested by either defendant or the prosecution.[116]
Requiring that defendant use advisory counsel and screen all motions through counsel is not an impermissible limitation on right of self-representation absent showing that participation of advisory counsel undermined jury perception of the *Faretta* right of self-representation, and trial court's admonitions, which occur outside jury's presence, appear to involve a need for assistance in procedural matters, and where there is no showing that counsel's participation eroded the self-represented defendant's actual control of the defense.[117]
It is both permissible and good practice for a trial court to require that appointed counsel represent a self-represented defendant excluded from the courtroom for disruptive behavior.[118]
District court, in keeping with its broad supervisory powers, has broad discretion to guide what, if any, assistance standby, or advisory, counsel may provide to a defendant conducting his own defense.[119]

[115] Locks v. Sumner, 703 F.2d 403, 407 (9th Cir. 1983) ("We agree with the Tenth Circuit. If the right to co-counsel is not of constitutional dimension . . we fail to see why the right to advisory counsel should be afforded higher status. The decision to allow a defendant to proceed with either form of hybrid representation is best left to the sound discretion of the trial judge.") (citations omitted). *But see*, United States v. Olson, 576 F.2d 1267, 1270 (8th Cir. 1978) ("[W]e have rejected the view that a defendant has a right both to represent himself and to be represented by counsel even if a request for such hybrid representation is made.").

[116] Hicks v. Duncan, 173 F.3d 860, *1 (9th Cir. 1999).

[117] United States v. Walsh, 742 F.2d 1006, 1007 (6th Cir. 1984).

[118] Davis v. Grant, 532 F.3d 132, 150 (2d Cir. 2008).

[119] United States v. Lawrence, 161 F.3d 250, 253 (4th Cir. 1998) ("The limits placed by the court on Lawrence's use of his standby counsel in this instance were reasonable. It simply restricted the standby counsel's advice to procedural matters.")

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[121] Beal v. Foster, 803 F.3d 356, 395 (7th Cir. 2015).

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[123] Manigualte v. C.W. Post of Long Island University, 533 Fed. Appx. 4, *5 (2d Cir. 2013).

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[127] United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975). The court, however, also held: "For the trial judge to assume the responsibility of examining witnesses for either party would change the judicial role from one of impartiality to one of advocacy. The fact that a defendant represents himself does not alter the judicial role nor does it impose any new obligation on the trial judge. The defendant under those circumstances must assume the responsibility for his inability to elicit testimony." *Id.* at *12.

[128] Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486, 487 (9th Cir. 1986) ("In devising this unusual procedure, the court made it clear that it was doing so in order to help the trial proceed more efficiently, to assist the pro se plaintiff in presenting his case to the jury, and to avoid unnecessary expense, confusion and embarrassment for him during the trial. In a post-trial conference, the district court articulated, for purposes of making a record for this anticipated appeal, the difficulties that trial courts face in trying civil cases before a jury when the plaintiff is not represented by counsel. The district judge described the problems that arise when a pro se plaintiff attempts to question himself, including the incessant objections from opposing counsel. The district court concluded that 'these [section 1983 pro se trials] are the most difficult cases we have in the district court'.").

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PART IV – JUDICIAL ETHICS

In addition to the modern trend of federal case law permitting some procedural assistance and information to SRLs, principles of modern judicial ethics also apply directly to this issue. The ABA Model Code of Judicial Conduct (MCJC) requires that judges "uphold and apply the law, and . . . perform all duties of judicial office fairly and impartially." [133] The 2007 amendments to the MCJC added the following comment: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[134] An explanation regarding the newly added comment states:

Throughout the life of the Commission, some witnesses urged the Commission to create special rules enabling judges to assist pro se litigants, while others urged the Commission to disregard calls for such rules. This Comment makes clear that judges do not compromise their impartiality when they make reasonable accommodations to pro se litigants who may be completely unfamiliar with the legal system and the

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[129] United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984) (citations omitted) ("A pro se defendant is subject to the same rules of procedure and evidence as defendants who are represented by counsel. . . . The district judge was extremely solicitous in handling Merrill's trial, and appointed advisory counsel to assist Merrill in the conduct of his pro se defense. On repeated occasions, the judge raised objections to evidence offered by the prosecution. Similarly, more than once during the trial, the judge excluded government counsel from the courtroom and provided Merrill with sound legal advice. The district judge made every reasonable effort to protect Merrill's right to a fair trial as well as his right to represent himself.").

[130] Scott v. Rosenthal, 53 Fed. Appx. 137, 142 (2d Cir. 2002).

[131] United States v. Filani, 74 F.3d 378, 386 (2d Cir.1996).

[132] *Id.* at 385.

[133] Model Code of Judicial Conduct r. 2.2 (Am. Bar Ass'n 2007).

[134] *Id.* at Comment 4.

litigation process. To the contrary, by leveling the playing field, such judges ensure that pro se litigants receive the fair hearing to which they are entitled. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage.[135]

The Conference of Chief Justices and the Conference of State Court Administrators in 2012 passed a resolution stating that "[a] judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard."[136] States were encouraged to modify the comments to their version of Rule 2.2 "to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants."

State judicial ethics codes are following the ABA's lead. An Illinois judicial ethics provision states: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of self-represented litigants to be fairly heard."[137] Thirty-three states and the District of Columbia have modified their judicial ethics rules by adding the same or similar provision as in the MCJC.[138] One of the more interesting variations of the ABA code comment is that adopted by Wisconsin:

A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following: 1. Construe pleadings to facilitate consideration of the issues raised. 2. Provide information or explanation

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135 Reporter's Explanation of Changes, Model Code of Judicial Conduct Reporter's Explanation of Changes r. 2.2 (Am.Bar Ass'n (2007) (emphasis added).

136 Resol. 2 *In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Reprenting Litigants* (Am. Bar Ass'n 2012)..

137 RULES GOVERNING THE LEGAL PROFESSION AND JUDICIARY IN ILLINOIS, S. Ct. R. 63(A)(4).

138 *Self-represented litigants and the code of judicial conduct*, Nat'l Ctr. for St. Cts, (Nov.25, 2014), https://ncscjudicialethicsblog.org/2014/11/25/pro-se-litigants-in-the-code-of-judicial-conduct.

about the proceedings. 3. Explain legal concepts in everyday language. 4. Ask neutral questions to elicit or clarify information. 5. Modify the traditional order of taking evidence. 6. Permit narrative testimony. 7. Allow litigants to adopt their pleadings as their sworn testimony. 8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order. 9. Inform litigants what will be happening next in the case and what is expected of them.[139]

Notably, the U.S. Judicial Conference adopted a new ethics code after the 2007 additions to the ABA's code but did not adopt their reference to permitting reasonable accommodations to SRLs.[140]

Thus, the evolution of judicial ethics vis a vis treatment of SRLs follows that of the aforementioned federal decisional law. Both of these developments contradict the Supreme Court's pronouncement that SRLs are not entitled to personal instruction about courtroom procedures. Yet, as the Supreme Court continues to lag behind these developments,[141] Most state high courts have also departed from the hard line, no-assistance approach.[142]

The incremental expansion of judicial assistance to SRLs should be greatly expanded, as has long been the case in Canada. There, courts have a judicial "duty of reasonable assistance" to SRLs.[143] Canadian case

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139 *Id.* at 7.

140 *Id.* at 1.

141 It should be noted that some commentators, including Prof. Rabeea Assy, oppose judicial assistance.

142 Rodriguez v. Alaska State Comm. for Human Rights, 354 P.3d 380, 387 (Alaska 2015) (courts are required to provide some procedural guidance for a pro se litigant when it is clear what action he or she is obviously trying to accomplish); Goldstein v. Fischer, 510 A.2d 184 (Conn. 1986) (Where a layman appears pro se, the court follows a liberal policy and carefully considers the party's claims as far as they are fairly presented upon the record to ensure that no injustice has been done under the law); State v. Gilbert, 326 P.3d 1060, 1063 (Kan. 2014) (Pro se pleadings are liberally construed, giving effect to the pleading's content rather than the labels and forms used to articulate the defendant's arguments); Hall v. Hall, 354 P.3d 1224, 1231 (Mont. 2015) (self-represented litigants should be granted some degree of latitude); Rubin v. Rubin, 457 A.2d 12 (N. J. 1982) (The self-represented litigant is deprived of a meaningful opportunity to be heard due to a lack of understanding of motion practice, and because it is "fundamental that the court system . . . protect the procedural rights of all litigants and to accord procedural due process to all litigants); State v. Sprunger, 458 S.W.3d 482, 491-92 (Tenn. 2015) ((courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system); Bd. of Zoning Appeals v. Tkacz, 764 S.E.2d 532, 536 (W. Va. 2014) (pro se litigants generally should not be held accountable for all of the procedural nuances of the law; it is the duty of the trial court to insure fairness, allowing *reasonable accommodations* for the pro se litigant so long as no harm is done an adverse party; the trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules; the court should strive to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake; cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not). (emphasis added).

143 Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience,* 17 MICH. ST. J. INT'L L. 601 (2008-09).

law articulating this duty, based on a judge's duty to ensure a fair trial, should be given serious consideration, because those decisions "come from a Commonwealth country with historical and legal roots similar to the U.S., which respects the rule of law, and which shares the same bedrock values of fairness, adversarial justice, and impartiality."[144] Despite the existence of this duty and the greater forms of judicial assistance courts are required or permitted to provide SRLs, Canadian courts, too, continue to struggle to define the boundaries of "reasonable assistance."[145]

CONCLUSION

This summary of the law on judicial assistance to SRLs indicates that federal courts have gradually shifted their view of the necessity for accommodating SRLs' lack of legal knowledge and skill. Departing from Supreme Court jurisprudence holding no, or minimal, instruction is to be provided SRLs, a growing number of court are accepting the reality that there is a need for accommodations, relaxation of ordinary strict enforcement of rules, and even affirmative assistance to prevent a forfeiture of rights or a miscarriage of justice. Assistance and self-help programs outside the courtroom extant in most states[146] are now found in growing numbers in federal courts.[147] The trend requiring or permitting some forms of assistance inside the courtroom reflected by the foregoing authorities is a welcome change that will enhance federal SRLs' access to justice.

The next challenge is to persuade the Supreme Court that, while the Constitution may not require judges to give SRLs "personal instruction," all courts – as a matter of due process, and the duty to ensure a fair trial– have an added duty to provide them with reasonable judicial assistance to avoid what the Court itself has recognized as an unfair "asymmetry-of- representation." Equal justice demands no less. As the quoted language at the outset of this piece states, "we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word."

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144 *Id.* at 606.

145 *Id.* at 616.

146 *Self-Representation Resource Guide*, Nat'l Ctr. for St. Cts., (Sept. 17, 2018), http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx.

147 Jefri Wood, PRO SE CASE MANAGEMENT FOR NONPRISONER CIVIL LITIGATION, Fed. Jud. Ctr., 1st ed. (2016).